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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA**

Amanda Houghton; Charles Douglas; and
Susan Franklin,

Plaintiffs,

v.

Compound DAO; Robert Leshner; Geoffrey
Hayes; AH Capital Management, LLC;
Polychain Alchemy, LLC; Bain Capital
Ventures (GP), LLC; Gauntlet Networks, Inc.;
Paradigm Operations LP,

Defendants.

Case No. 3:22-cv-07781-WHO

**DEFENDANTS' RESPONSE TO
PLAINTIFFS' SURREPLY REGARDING
DEFENDANTS' MOTION TO DISMISS**

Hearing Date: August 16, 2023
Time: 2:00 PM
Courtroom: Courtroom 2
Before: Hon. William H. Orrick

1 The arguments in Plaintiffs’ Surreply Regarding Defendants’ Motion to Dismiss (the
2 “Surreply”), ECF No. 89–2, lack merit and do not save the Amended Complaint from dismissal.

3 Plaintiffs first contend that Defendants waived the argument that “‘the Securities Act does
4 not allow [a] theory of partnership liability’” because it was a “new argument . . . ‘raised for the
5 first time in a reply brief.’” Surreply at 1. This assertion fails because it rests on a false premise.
6 An argument first raised in a reply brief is not “new,” in the relevant sense, when it “responds to
7 arguments raised by Plaintiff[s] in the opposition” brief. *Afifeh v. Ahamadabadi*, 2022 WL
8 3016147, at *1 (C.D. Cal. July 5, 2022); *see also Applied Materials, Inc. v. Demaray LLC*, 2020
9 WL 8515132, at *1 (N.D. Cal. Dec. 16, 2020). Defendants’ Reply did just that. Plaintiffs initially
10 alleged that “*Defendants sold COMP tokens both by transferring title to COMP tokens directly to*
11 *class members and/or by soliciting the purchase of COMP tokens by Plaintiffs.*” Am. Compl. ¶
12 212, ECF No. 76 (emphasis added). Defendants’ Motion to Dismiss (“Mot”), ECF No. 79, rebutted
13 that assertion, explaining that Plaintiffs failed to state a claim against any individual Defendant or
14 the “Compound DAO.” Mot. at 7-8. But in the Opposition (“Opp.”), ECF No. 82, Plaintiffs pivoted
15 to a theory that “each Defendant is liable to Plaintiffs based on [the ‘Compound DAO’s’]
16 solicitation activities” because each Defendant is a general partner of the “Compound DAO.” Opp.
17 at 12; *see also id.* at 22 (arguing Defendants “are liable for Compound’s actions as its partners”).
18 Plaintiffs’ shift prompted Defendants’ response that the Securities Act “forecloses holding any
19 Defendants individually liable” under Section 12 “for the alleged actions of the ‘Compound
20 DAO.’” Reply at 4. This response was timely because Defendants were not required to “anticipate
21 and rebut” a theory that Plaintiffs did not plead. *Turocy v. El Pollo Loco Holdings, Inc.*, 2018 WL
22 3343493, at *13 (C.D. Cal. July 3, 2018).

23 Plaintiffs suggest that the Amended Complaint previewed this issue with a passing reference
24 to the proposition that “[a] general partner . . . is liable for all debts of a partnership” under
25 California law. Surreply at 2; Am. Compl. ¶ 92. But as Plaintiffs recognize, that proposition bears
26 on a “state-law question of who must answer for a general partnership’s wrongdoing,” not “the
27 federal-law question of who committed the statutory violation.” Surreply at 1. Referring to a state
28 law judgment-enforcement principle related to secondary liability for partners, *see id.* at 2 (citing

1 *Mariani v. Price Waterhouse*, 70 Cal. App. 4th 685, 706 (1999)), did not apprise Defendants of
 2 Plaintiffs' unsupported position that pleading a claim against a partnership is equivalent to pleading
 3 a claim against each individual partner under Section 12.¹

4 As to the merits, Plaintiffs' argument that individual Defendants can be liable under Section
 5 12 for acts of the "Compound DAO general partnership," Surreply at 1, is wrong. As Plaintiffs
 6 concede, "only those who solicit the sales of unregistered securities violate the Securities Act."
 7 Surreply at 2; *see also Pinter v. Dahl*, 486 U.S. 622, 646 (1988) (Section 12 liability "extends only
 8 to the *person who successfully solicits the purchase*" (emphasis added)). The only entity that
 9 Plaintiffs now allege solicited sales is the "Compound DAO." *See* Surreply at 2 ("Plaintiffs do not
 10 presently allege that the Partner Defendants are *directly* liable under Section 12."). But the
 11 "Compound DAO" has not even been served, *see* Mot. at 2 nn.1 & 2; Reply at 4, and, in any event,
 12 Plaintiffs cite no case law in any of their papers in which partners who were not themselves directly
 13 liable were nonetheless found individually liable under Section 12 based on a partnership's
 14 violation of Section 12.

15 Plaintiffs nevertheless seek to support their novel expansion of Section 12 liability by citing
 16 Section 2 of the Securities Act, which defines "person" to include "a partnership." Surreply at 1.
 17 But Section 2 does *not* define "person" to include "a *partner*," nor does it otherwise contemplate
 18 that partners could be directly liable for acts of the partnership. Critically, where Congress intended
 19 to make partners directly liable for a partnership's actions, they did so explicitly, as in Section 11,
 20 which extends liability to "every person who was a . . . partner in the issuer." 15 U.S.C. § 77k(a)(2);
 21 *see* Reply at 4-5 (citing *Russello v. United States*, 464 U.S. 16, 23 (1983)).

22 For these reasons, Plaintiffs fail to state a claim against any individual Defendant and, for
 23 the reasons explained in Defendants' briefing, fail to state a claim against the "Compound DAO."
 24

25 ¹ Even if Plaintiffs were correct that Defendants raised this argument for the first time on
 26 Reply (they are not), this Court has "discretion to consider arguments raised . . . for the first time
 27 in a reply brief," and should do so here. *Border Power Plant Working Grp. v. Dep't of Energy*,
 28 2006 WL 8455397, at *2 (S.D. Cal. Feb. 8, 2006) (citing *Glenn K. Jackson Inc. v. Roe*, 273 F.3d
 1192, 1202 (9th Cir. 2001)) (considering new reply argument where plaintiff filed surreply); *see*
 also *Wilridge v. Marshall*, 2014 WL 1217974, at *3 n.4 (N.D. Cal. Mar. 21, 2014) (similar).

1 Dated: August 7, 2023

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FILER'S ATTESTATION

I, Jennifer Kennedy Park, am the ECF User whose ID and password are being used to file this Notice of Motion and Motion to Dismiss. In compliance with Civil Local Rule 5-1(i), I hereby attest that concurrence in the filing of this document have been obtained from each of the other signatories.

Dated: August 7, 2023

/s/ Jennifer Kennedy Park
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